Epic Security Corporation *and* United Federation of Police Officers

Epic Security Corporation *and* Louis Bracht. Cases 2–CA–28188, 2–CA–28296, and 2–CA–28329

May 15, 1998

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HURTGEN

On October 11, 1996, Administrative Law Judge James F. Morton issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed cross-exceptions and a supporting brief, and the Respondent and the General Counsel filed answering briefs. The General Counsel filed a reply to the Respondent's answering brief; and the Respondent submitted a response memorandum in further support of its exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] only to the extent consistent with this Decision.

(1) We adopt the judge's finding that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging Louis Bracht.

(a) In late December 1994, Nestor Gonzalez, one of the Respondent's employees, began distributing union authorization cards to fellow guards in areas in the building in which the Respondent's New York City office was located.

On January 11, 1995, as Louis Bracht, another of the Respondent's guard employees, and his partner, Nelson Torres, were making a cash delivery at a bank, Angel Lopez, an off-duty employee, approached their armored truck with his hand in his pocket.[3] Torres told Lopez to stop and empty his pockets, and Bracht patted Lopez down. After a brief conversation, Lopez left. Bracht did not immediately file an incident report. A few days later, dispatcher (surnamed) Beck, a supervisor, asked Torres about the incident. Torres reported the conversation to Bracht. On January 16, Bracht filled out an ''unusual incident report,'' setting forth the circumstances of the January 11 incident, and left it on the desk of Assistant Operations Manager Joseph DeVittorio.

On February 17, the Respondent's vice president of operations, Selwyn Falk, observed Bracht talking to several other employees outside its place of business. Falk broke up the discussion, warned Bracht against discussing the Union, interrogated Bracht about the location of a union meeting scheduled for that evening, and told Bracht that it would find out the location of the union meeting from one of its ''sources,'' thereby creating the impression that the Respondent was engaging in surveillance of employees' union activities.

In early March 1995, Lopez talked to DeVittorio about the January 11 incident. DeVittorio told Lopez that he should not have walked up to the vehicle uninvited, because Bracht and Torres may have felt threatened by his approach. DeVittorio warned Lopez never to approach an Epic Security vehicle without being invited, and Lopez agreed. DeVittorio later told Torres that he had warned Lopez never to approach an Epic vehicle uninvited, but did not discuss the incident with Bracht.[4]

On April 6, 1995, Falk told Bracht that he had just received a complaint that Bracht and Torres had ''menaced'' a fellow security officer and that Bracht had pulled a gun on the officer. Falk was referring to the January 11 incident involving Lopez. Bracht denied having drawn his gun. He said that all he did was touch his gun and that he was just ''fooling around.''[5] Falk discharged Bracht for ''violations of firearms

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] Chairman Gould adopts the judge's finding that the Respondent violated Sec. 8(a)(1) of the Act by attempting to dissuade a former supervisor from testifying as a witness in this case. The Chairman notes, however, that he disagrees with the Board's decision in *Parker-Robb Chevrolet*, 262 NLRB 402 (1982), affd. sub nom. *Automobile Salesmen's Union Local 1095 v. NLRB*, 711 F.2d 383 (D.C. Cir. 1983), which the judge relied on in part as support for finding this violation, to the extent that it limits the reach of Sec. 8(a)(1) in cases of discrimination against statutory supervisors.

[3] Bracht, Torres, Selwyn Falk, and Joseph DeVittorio all were aware of an incident which had occurred shortly before that date, when an off-duty employee of the Respondent had approached an on-duty employee in similar circumstances, pulled a gun, and shot the employee.

[4] The Respondent has excepted to the judge's admission of DeVittorio's testimony regarding this conversation with Lopez, over the Respondent's objection at the hearing. The Respondent contends, as it did before the judge, that the testimony was elicited on cross-examination and was beyond the scope of the direct examination. Contrary to the Respondent, our examination of the record shows that the testimony elicited from DeVittorio on cross-examination is related to his testimony during direct examination regarding his knowledge of the January 11 incident. We find that DeVittorio's testimony was properly admitted and, accordingly, we deny the Respondent's exception to the judge's ruling.

[5] Torres corroborated Bracht's testimony. Lopez did not testify at the hearing. Further, we note that Bracht's testimony is consistent with the decision of the New York State Unemployment Compensation Board, placed in evidence by the Respondent and discussed infra, finding that Bracht had violated a company rule by making ''threatening motions *as if* he was going to remove his gun from his holster . . . .'' (Emphasis added.)

rules and regulations and the fact that (Bracht) menaced one of (the Respondent's) employees in public.'' Falk confiscated Bracht's gun permit and turned it in to the license division of the New York City Police Department. Torres was not disciplined in connection with the incident.

On these facts, the judge rejected Falk's testimony that he did not learn about the January 11 incident until April 6. He found that Bracht had placed the incident report on the desk of Falk's assistant, DeVittorio, on January 16. He further found that the Respondent was aware of the January 11 incident in January when, shortly after Bracht left the incident report on DeVittorio's desk, Supervisor Beck questioned Torres about the incident. The judge found that the Respondent was aware of Bracht's support for the Union on February 17, when Falk interrogated and threatened Bracht about his union activities and created the impression that employees' union activities were under surveillance. The Respondent's antiunion animus is evident in its conduct towards Bracht and its pattern of unlawful conduct aimed at discouraging employees' union organizing efforts. Thus, in agreement with the judge, we find that the General Counsel has established facts sufficient to support an inference that the Respondent's animus against Bracht's support for the Union was a motivating factor in the decision to discharge him. *Wright Line*, 251 NLRB 1083 (1980).[6]

We further find that the Respondent has not satisfied its burden of showing that it would have discharged Bracht in the absence of his protected activities. Id. The Respondent was aware of the January 11 incident almost immediately, yet it took no action against Bracht for 3 months. The nature of the Respondent's contemporaneous concern about the incident was expressed by DeVittorio, who warned Lopez against making further uninvited approaches to on-duty guards, and reported to Torres that Lopez had agreed to refrain from that conduct in the future. We agree with the judge that DeVittorio appears to have viewed Lopez as the one at fault for the incident.

Falk's shifting and contradictory explanation of Bracht's discharge provides further support for our finding. Thus, Falk variously testified that he alone, and he in consort with others, made the decision to terminate Bracht. Although the sole explanation given by Falk to Bracht for the discharge was Bracht's purported firearms violation, at the hearing Falk testified that Bracht was discharged because he was a ''lousy employee'' who had experienced a variety of performance problems, and that the January 11 incident was simply the one that made Bracht ''fall into the water.'' The Respondent's records reveal, however, that Bracht's disciplinary record was clear for 2 years prior to Falk's coercively interviewing Bracht about his union activities on February 17 and the Respondent's issuance of the unlawful warning to Bracht that same day.

(b) We affirm the judge's denial of the Respondent's motion to reopen the record for further examination and voir dire regarding an audiotape recording of the April 6, 1996 meeting during which Bracht was discharged. At the hearing, the judge established a reasonable procedure for the admission of the tape and transcriptions into evidence. He permitted the Respondent and the General Counsel independently to submit into evidence transcriptions of the audiotape, and reserved the right to resolve any discrepancies based upon his review of the audiotape. The parties' versions of the audiotape were in substantial accord. The General Counsel accepted in substance the Respondent's transcription, noting two differences, which the judge found ''minor and inconsequential.'' Thus, the judge relied on the Respondent's transcription. Furthermore, the facts and circumstances surrounding Bracht's discharge were fully litigated and briefed. Thus, we find no merit in the Respondent's claim that it has been prejudiced by the judge's resolution of this matter. For reasons given by the judge, we also reject the Respondent's claim that a clicking sound at one point in a copy of the tape renders the tape unreliable.

We affirm the judge's denial of the Respondent's motion to reopen the record to allow it to introduce, as newly discovered evidence, a recording of a conversation between Bracht and employee Gonzalez which was recorded on the reverse side of the tape of the April 6 discharge meeting. Section 102.65(e)(1) of the Board's Rules and Regulations provides, in pertinent part, that a party to a proceeding may, because of extraordinary circumstances, move after the close of the hearing for reopening of the record to admit newly discovered evidence. To prevail on its motion, the movant must specify, inter alia, the prejudice to the movant if the record is not reopened, and the result the new evidence would require if adduced and credited. We find that the Respondent has not satisfied these requirements. We assume, arguendo, that the tape of the

[6] The Respondent has excepted to the judge's ruling that the denial of benefits to Bracht by the New York State Unemployment Insurance Appeal Board has no material impact regarding the issue whether Bracht's discharge violated Sec. 8(a)(3) and (1) of the Act. In agreement with the judge, we find that the decision of the State Board is not dispositive of the issue before us. Original jurisdiction over the issue of employment discrimination under the National Labor Relations Act has been committed by Congress to the National Labor Relations Board. The State Board's decision was predicated on Bracht's violation of the Respondent's firearms rules. Moreover, the State Board expressly stated the limits of its jurisdiction, finding that Bracht's rules violation ''constituted misconduct *for unemployment insurance purposes*.'' (Emphasis added.) There is no evidence that the NLRB was represented at the state proceeding or that the Act was mentioned or considered. *Seaboard Farms of Athens, Inc*., 292 NLRB 776, 788 (1989).

Bracht-Gonzalez conversation qualifies as newly discovered evidence, because the Respondent apparently did not receive the tape until the close of the hearing. The Respondent does not allege, however, that the Bracht-Gonzalez conversation is directly relevant to events surrounding Bracht's discharge, but only that it bears generally on Bracht's credibility. The judge's finding that Bracht's discharge violated the Act is based, not only on Bracht's credibility, but on the credited testimony of a number of other witnesses, evidence contained in the Respondent's version of the transcript of the discharge meeting, and other evidence set forth in the judge's decision. Even assuming the admissibility and the relevance of the Bracht-Gonzalez conversation, the Respondent has not explained how it will be prejudiced if the audiotape is not admitted into the record or how the evidence would change the result we reach here. Accordingly, we grant the General Counsel's request that the transcript of the Bracht-Gonzalez conversation, which is appended to the Respondent's exceptions and brief, be stricken from the record.

(c) Having found that the Respondent discharged Bracht because of his union activities, in violation of Section 8(a)(3) and (1) of the Act, the judge recommended that the Respondent be required to reinstate Bracht and take affirmative steps to assist Bracht in obtaining restoration of his gun permit. The Respondent has excepted to the judge's recommended remedy. It contends that Bracht has ''violated multiple sections of the [New York State] penal code and put the lives of employees in jeopardy.'' Thus, ''[b]y law Epic can not take [Bracht] back because he can not truthfully obtain the necessary [gun] permits.'' We agree with the judge that a reinstatement remedy is warranted in this case. For the reasons that follow, however, we grant the Respondent's exception, but only to the extent that it raises matters which ultimately must be resolved by the New York State and City gun licensing authorities.[7] We modify the recommended order accordingly.

The evidence indicates that, upon Bracht's discharge, the Respondent required that Bracht give the Respondent his gun license. It appears that the Respondent then sent the license to the local authorities who revoked the license.[8] The basis for this revocation is unclear. For example, it could have been revoked because of the discharge, or it could have been revoked because of Bracht's conduct on January 11. Since the Respondent forwarded the license to the authorities because of the discharge, and since the discharge was unlawful, we shall require the Respondent to reinstate Bracht immediately to a position substantially equivalent to that of armed guard pending final adjudication of Bracht's request for restoration of his license, and to assist Bracht in seeking restoration of the license. However, unless and until restoration is secured, we shall not order reinstatement of Bracht to a position requiring a gun license.

We view the instant order to reinstate Bracht as an appropriate, measured exercise of our affirmative remedial authority, specifically designed to carry out our statutory obligation to effectuate the policies of the Act. Bracht was a union adherent discharged because of his statutorily protected activity and in order to discourage other employees from supporting the Union. The Respondent's contention that it discharged Bracht in April 1995 because of an alleged history of work-related problems culminating in the January 11 incident has been shown to be pretextual.

We recognize that Bracht's ability to regain his gun license and, thus, qualify for reemployment as an armed guard, is a matter solely within the jurisdiction of the New York State and city authorities.[9] Accordingly, as noted, we shall order the Respondent to reinstate Bracht immediately to a position substantially equivalent to that he previously held, pending final adjudication by the New York authorities of Bracht's request for restoration of his gun license, and upon Bracht's regaining the license, to a position as an armed guard.[10] Thus, the Respondent has no obligation to reinstate Bracht as an armed guard until he is properly licensed to carry a weapon. See *De Jana Industries*, 305 NLRB 845 (1991); *Future Ambulette*, 293 NLRB 884 (1989), enfd. as modified 903 F.2d 140 (2d Cir. 1990).[11]

Finally, backpay (at the armed guard rate) runs from the time of discharge until reinstatement to a substantially equivalent position. If there is no such position, backpay runs until Bracht secures substantially equivalent employment elsewhere.

(2) Contrary to the judge and our dissenting colleague, we find that the Respondent violated Section 8(a)(3) and (1) of the Act by transferring Nestor Gon-

[7] In doing so, we do not pass on assertions made by the Respondent, in its exceptions and brief, that Bracht ''put the lives of employees in jeopardy,'' ''assaulted an employee,'' ''repeatedly used respondent's vehicles for his own personal use in violation of State law,'' and committed multiple firearms violations.

[8] However, it does not affirmatively appear that state authorities have finally ruled on the matter.

[9] The relevant state and city laws and regulations were not placed in evidence. There is no evidence establishing the impact, if any, of the decision of the New York State Unemployment Compensation Board on Brach's ability to qualify for a gun license.

[10] Even if the Respondent has no substantially equivalent position, it remains under an obligation to reinstate Bracht to his prior position if and when Bracht re-secures his gun license.

The Respondent's offer of reinstatement must spell out these obligations, and the obligation to assist in securing restoration of the gun license.

[11] The impact of the New York authorities' disposition of Bracht's license application on the instant remedial order, if any, can be raised at the compliance stage of these proceedings.

zalez on February 2, 1996,[12] and by failing to reinstate him to his former position of employment.

The judge found that, on January 24, 1995, Selwyn Falk, the Respondent's vice president of operations, directed Gonzalez to meet with him and the Respondent's attorney, Aaron Lichtman, in Lichtman's office. Gonzalez found this ''very unusual.'' Lichtman asked Gonzalez if he had passed out union authorization cards to employees. Gonzalez admitted that he had done so. Lichtman warned Gonzalez to stop distributing authorization cards and informed Gonzalez that the warning would be made part of his employment record and that he would be discharged if he continued to distribute the cards. Falk asked Gonzalez why employees did not come to him instead of going to the Union. The judge found, and we agree, that the Respondent thus violated the Act by coercively interrogating Gonzalez,[13] creating the impression that it kept his union activities under surveillance, and threatening him with discharge if he continued his union organizing activities.

For several months prior to late January, Gonzalez and Alberto Roque had been working as partners on ''cash team 10.'' While working on the cash team, Gonzalez reported daily to the Respondent's office where he came in contact with other employees. Gonzalez was summoned to jury duty on January 27. According to Gonzalez, when he returned to work on February 1, Assistant Operations Manager DeVittorio explained that he had ''put someone on [cash team 10] temporarily'' because he thought Gonzalez would be on jury duty for 2 weeks.[14] He assigned Gonzalez to guard a building in the South Bronx that was undergoing renovation, to keep squatters out of the building. Initially there was a second guard assigned to the South Bronx site, but the second guard soon was reassigned, leaving Gonzalez as the lone guard at the site. Gonzalez only visited the Respondent's offices once a week, on Fridays, to pick up his paycheck.

In mid-February, Gonzalez learned from Roque that Roque did not have a steady partner on cash team 10. Gonzalez asked DeVittorio to reassign him to cash team 10. DeVittorio told him that another employee had that job; however, the Respondent's own records corroborate Roque's assertion that several different employees were assigned to cash team 10 during the relevant period. On February 13, the Union filed an unfair labor practice charge alleging that Gonzalez's transfer was unlawful.

On February 17, Gonzalez went to the Respondent's office to pick up his paycheck. He was speaking with several coworkers about a block away from the Respondent's office when Falk approached, broke up the discussion, and told Gonzalez that he did not want him to ''bother'' the other guards. Falk left, and later returned and told Gonzalez to ''get off the street'' and ''stop bothering the guards.'' That same day DeVittorio issued Gonzalez a disciplinary notice for ''soliciting'' an on-duty employee in contravention of the Respondent's ''solicitation policy.'' The Respondent had not ever before promulgated a lawful no-solicitation rule. Thus, the judge found, and we agree, that the Respondent adopted its no-solicitation policy in order to inhibit employees' exercise of their Section 7 rights, unlawfully restricted employees in the exercise of their Section 7 rights, and unlawfully disciplined Gonzalez.

On March 2, in response to the unfair labor practice charge filed by the Union in protest of Gonzalez's transfer, the Respondent permitted Gonzalez to select a new worksite from among assignments then available. Gonzalez selected another single-guard site in Manhattan.[15] The Respondent began delivering Gonzalez's paycheck to him onsite, thus eliminating the opportunity for Gonzalez to visit the Respondent's office, and further isolating him from coworkers.

In these circumstances, the judge nonetheless found that the General Counsel did not sustain his burden to show that the Respondent transferred Gonzalez in order to impede his union organizing efforts. Although the judge found the timing of Gonzalez's transfer suspicious, he found that even before Gonzalez began his union organizing activities, the Respondent had assigned Gonzalez to other undesirable buildings where his access to coworkers was similarly restricted. Accordingly, the judge concluded that evidence as to the timing of the transfer is not sufficient to support a

[12] We correct the judge's inadvertent reference to March 2, 1996, as the date of the unlawful transfer. The unlawful transfer took place on February 2, 1996. As discussed herein, the Respondent transferred Gonzalez on February 2, and again on March 2, 1996. Only the February transfer was alleged to be unlawful.

[13] We find that the amendment to the complaint in this case does not run afoul of Sec. 10(b) of the Act and is not properly subject to a defense of laches. The original charge in this case, Case 2–CA–28188, filed February 13, 1995, alleged that the Respondent unlawfully transferred Gonzalez to a less desirable shift and increased his work hours. The amended charge, filed January 30, 1996, alleged, in relevant part, that about January 24, 1995, the Respondent engaged in unlawful interrogation of employees. As we fully discuss in this decision, Gonzalez's transfer occurred shortly after a meeting on January 24, 1995, in which the Respondent and its attorney unlawfully interrogated and threatened Gonzalez and warned him because of his union activities, and threatened him with discharge if he continued to engage in union activities. We find that the transfer was part of a pattern of conduct by the Respondent aimed at impeding Gonzalez's union organizing activities. Thus, we find that the conduct alleged to be unlawful in the amended charge is closely related to the conduct alleged in the original charge and is predicated on the same legal theory. See *Nickles Bakery of Indiana*, 296 NLRB 927, 928 fn. 5 (1989).

[14] DeVittorio did not contradict Gonzalez' testimony in this regard.

[15] There is no evidence regarding the number or types of assignments that were available or that cash team 10 was among the available worksites offered to Gonzalez. Thus, there is no evidence as to whether the assignment list included multiguard sites.

finding of discrimination. In all the circumstances present in this case, we cannot agree that the Respondent's work assignment policy and practice are dispositive of the issue of Gonzalez's transfer.[16]

Gonzalez was known to the Respondent as a union activist and, as shown, the Respondent engaged in a pattern of coercive conduct, including unlawful threats, interrogation, and disciplinary action, aimed at impeding Gonzalez's union activities. Gonzalez had been assigned to cash team 10 for an extended period of time before he was summoned to jury duty. There is no evidence that the Respondent had contemplated reassigning Gonzalez prior to that time. After Gonzalez's brief absence for jury duty, and while the Respondent was engaged in a pattern of unlawful antiunion conduct, the Respondent reassigned Gonzalez to a lone worksite, thereby substantially reducing his contacts with other employees. See *New Process Co.*, 290 NLRB 704, 722–723 (1988). We find this evidence sufficient to support an inference that animus against union activities was a motivating factor in the transfer of Gonzalez. *Wright Line*, 251 NLRB 1083 (1980).

We further find that the Respondent has not satisfied its burden of demonstrating that it would have transferred Gonzalez in the absence of his union activities. Id. The Respondent offers several explanations for the transfer. First, it contends that it had permanently replaced Gonzalez on cash team 10, making his reassignment necessary. As shown above, credited evidence disproves that contention. Moreover, under the circumstances present here, we find unpersuasive the Respondent's assertion that Gonzalez' February 2 transfer was consistent with the Respondent's policy reserving complete discretion over work assignments and its past practice of reassigning Gonzalez. While the record discloses that the Respondent exercised discretion to make and change employee assignments, it does not establish that in exercising such discretion the Respondent disregarded employee preferences, such as Gonzalez' desire to return to cash team 10 on which he had worked for several months before his jury duty and on which he had not been permanently replaced.[17]

The Respondent also contends that it transferred Gonzalez to the Bronx site to resolve problems that had arisen there and to ''keep the men in order.'' As shown, except for a short period of time when a second guard was posted at the site, there were no ''men'' for Gonzalez to keep in order. Moreover, the record does not contain evidence corroborating the Respondent's bare claim that unusual problems had arisen at the Bronx site or that the Respondent had been contemplating the addition of a second guard.[18] Thus, we find that the reasons proffered by the Respondent for transferring Gonzalez on February 2 are pretextual, i.e., they were not the real reasons for the transfer.

Accordingly, we find that by transferring Gonzalez on February 2, 1995, the Respondent has violated Section 8(a)(3) and (1) of the Act.

(3) We grant the General Counsel's exception to the judge's apparently inadvertent failure to conclude that the Respondent violated Section 8(a)(1) of the Act when it engaged in surveillance of employees in early 1996, as alleged in an amendment to the unfair labor practice complaint.[19]

The judge credited testimony by employee Gonzalez that, on a Friday early in 1996, he, Louis Bracht, and Union President Ralph Purdy stationed themselves outside the building where the Respondent's offices are located and distributed union authorization cards to guards as they arrived to pick up their paychecks. The Respondent had posted its supervisors in and around the front of the building. Two of the supervisors followed Gonzalez as he spoke with coworkers and handed out authorization cards. Some guards used hand and eye gestures to indicate to Gonzalez that they were being watched by the supervisors. When Purdy handed an authorization card and flyer to a guard, several supervisors surrounded the guard and led him into the building.

Based on this evidence, the judge found that the Respondent unlawfully impeded the Union in its attempt to distribute its literature. The judge failed to address the additional complaint allegation that the Respondent's conduct also constituted unlawful surveillance of employees' union activities. We find that it does.

The test for finding a violation of Section 8(a)(1) is ''whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free

[16] In that regard, we find that *American Furniture Co.*, 293 NLRB 408, 415 (1989), relied on by the judge, is distinguishable from this case. There, unlike this case, the transfer involved a change of work assignment at the same location. There was no evidence that the change in assignment served to isolate a union activist from coworkers.

[17] The Respondent's vice president of operations, Selwyn Falk, testified as ''part of the interview process, [employment applicants] are told that they must be available to work any shift, any borough.'' But he also acknowledged that when an employee is dissatisfied with an assignment, ''we try to accommodate people. If there was a mitigating circumstance, we might accommodate them.''

[18] Indeed, the Respondent's transfer of the second guard away from the Bronx site soon after Gonzalez' arrival suggests that there were no problems of that magnitude. In its answering brief, the Respondent acknowledges that the second guard was removed at the behest of its client, who did not want to employ two guards at the site.

[19] On the first day of the hearing, and over the Respondent's objection, the judge granted the General Counsel's motion to amend the complaint to include, inter alia, allegations that in February 1996, the Respondent confiscated union authorization cards from employees, created the impression of surveillance, and engaged in surveillance of employees. The Respondent did not renew its objection to this amendment in its exceptions and brief. As discussed here, however, in its brief answering the General Counsel's exceptions, the Respondent defends its conduct on the basis of its purported security concerns.

exercise of employee rights under the Act.'' *Williamhouse of California, Inc*., 317 NLRB 699, 713 (1995), citing *American Freightways Co*., 124 NLRB 146 (1959). Here, the Respondent posted its supervisors in front of its offices where they observed the Respondent's employees as they reported for work.[20] The supervisors watched to see which employees talked to the union representatives and interfered with those contacts. Thus, we find that the General Counsel has presented a prima facie case that the Respondent was engaged in surveillance of its employees union activities.

In agreement with the judge, we find unpersuasive the business justification profferred by the Respondent generally for the presence of the supervisors outside its offices, i.e., that it was motivated to assign supervisors to monitor employee movements near its building because of safety and property concerns,[21] past experience with theft and vandalism, and complaints from neighboring businesses about guards loitering around the front of the building, making noise, and depositing trash. Although the record generally supports the Respondent's claim that it has posted guards outside its offices from time to time since about 1989, there is no convincing evidence that these guards were supervisors or that they were posted outside the building, as opposed to inside the lobby and the hallways and the parking lot. In fact, the Respondent admitted at the hearing that it did not start posting supervisors outside the building until early 1996.[22]

Further, the Respondent has not demonstrated a causal connection between the incidents which purportedly gave rise to its safety and property concerns and its decision to post supervisors outside its offices in January 1996. Some of the incidents occurred remotely in time, and thus they are not shown to have a causal connection to the posting of supervisory guards in 1996, i.e., a 1994 change in payroll procedure and a 1993 robbery. The Respondent's theft and vandalism concerns centered on vehicles in the Company's parking lot, which is located at some distance from the Respondent's offices. Thus, there is no apparent causal connection between vehicle thefts and vandalism and the posting of supervisory guards in front of its offices. There is no clear evidence establishing when the Respondent received complaints from neighboring businesses. Moreover, the record is unclear regarding the connection between those complaints and the decision to post guards in front of the building.[23]

As reasonably perceived by employees, the only purpose that emerges from the record before us for the Respondent's posting of supervisors in front of its office on paydays, beginning in January 1996 at the height of its employees' union organizing campaign, was to observe employees who had contact with the union representatives and to interfere with those contacts. This is a classic example of unlawful surveillance of employees' union activities. We find that it violated Section 8(a)(1).

AMENDED CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization as defined in Section 2(5) of the Act.

3. The Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act in interfering with, restraining, and coercing its employees in the exercise of their rights under Section 7 of the Act by having:

(a) Coercively interrogated them as to their support for the Union.

(b) Threatened them with discharge if they continued to support the Union.

(c) Created the impression among them that their activities on behalf of the Union were being kept under surveillance.

(d) Directed them not to discuss the Union among themselves.

(e) Posted a notice which encouraged its employees to inform it of the identity of employees who solicit the signing of union authorization cards.

(f) Impeded the distribution of union authorization cards to its employees.

(g) Engaged in surveillance of employees' union activities.

(h) Attempted to dissuade a witness from testifying in this case.

(i) Engaged in the conduct set forth in the following paragraph.

4. The Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(3) of the Act in discriminating against its employees with respect to

[20] The union representatives conducted their activities on the public sidewalk in front of the building in which the Respondent maintained its office. The Respondent has not claimed an exclusory property interest in the sidewalk area.

[21] We agree with the General Counsel that the Respondent's reliance on *McGraw Edison Co*., 259 NLRB 702 (1981), is misplaced. There, the Board found that the employer had reasonably anticipated violence. Thus, the Board found lawful the employer's posting supervisors outside its premises while union organizers were distributing authorization cards. Here, there is no evidence that the Respondent had reason to fear violence among employees on paydays.

[22] Thus, this is not a case in which the employer was able casually, and in the ordinary course of business, to observe employees engaging in public union activities. See *Sands Hotel & Casino*, 306 NLRB 172 (1992).

[23] For example, the Respondent's vice president, Falk, and Administrative Manager Chevalier testified that the Respondent addressed neighbor's complaints about loitering by expanding its offices to provide more room inside the building, particularly in the area where the payroll was processed.

their terms and conditions of employment in order to discourage them from joining or supporting the Union by having:

(a) Issued a warning, dated February 17, 1995, to Nestor Gonzalez.

(b) Transferred Nestor Gonzalez to a new worksite on February 2, 1995.

(c) Discharged Louis Bracht on April 6, 1995.

5. The unfair labor practices described above in paragraphs 3 and 4 affect commerce within the meaning of Section 2(6) and (7) of the Act.

6. The Respondent has not engaged in any of the other unfair labor practices alleged in the consolidated complaint, as amended, in this case.

ORDER

The National Labor Relations Board orders that the Respondent, Epic Security Corporation, Bronx, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating any employee about activities on behalf of the United Federation of Police Officers (the Union).

(b) Discharging or otherwise discriminating against any employee for supporting the Union.

(c) Reassigning or transferring employees in order to interfere with their union activities.

(d) Threatening its employees with discharge to discourage them from supporting the Union.

(e) Engaging in surveillance of employees' activities on behalf of the Union.

(f) Creating the impression among employees that their activities on behalf of the Union are being kept under surveillance.

(g) Directing its employees not to discuss the Union.

(h) Posting a notice encouraging its employees to inform it of the identity of those who solicit employees to sign union authorization cards.

(i) Impeding the distribution of union authorization cards.

(j) Attempting to dissuade a witness from testifying in an unfair labor practice proceeding.

(k) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Louis Bracht immediate employment to a position substantially equivalent to that of armed guard, pending restoration of his license to carry a weapon; assist Louis Bracht in obtaining restoration of his license to carry a weapon; and, upon restoration of his license to carry a weapon, offer Louis Bracht immediate and full reinstatement to his former job or, if it no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Louis Bracht whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge and notify Louis Bracht in writing that this has been done and that the discharge will not be used against him in any way.

(d) Within 14 days from the date of this Order, offer Nestor Gonzalez a reassignment to his former job on cash team 10 or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(e) Make Nestor Gonzalez whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the decision.

(f) Within 14 days from the date of this order, remove from its files any reference to the disciplinary notice of February 17, 1995, given Nestor Gonzalez and notify him in writing that this has been done and that the notice will not be used against him in any way.

(g) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(h) Within 14 days after service by the Region, post at its New York City facility copies of the attached notice marked ''Appendix.''[24] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 24, 1995.

[24] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

(i) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

MEMBER HURTGEN, dissenting in part.

I agree with the administrative law judge that the Respondent did not violate the Act by transferring Nestor Gonzalez to a new worksite on February 2.

Gonzalez was summoned to jury duty on January 27, 1995. Because of this, the Respondent replaced him as a member of cash team 10. When Gonzalez returned from jury duty on February 1, his position on cash team 10 had been filled.[1] The Respondent thus assigned him to a South Bronx building. In mid-February, Gonzalez asked to be transferred back to cash team 10. The Respondent replied that there was no opening on cash team 10. However, on March 2, the Respondent told Gonzalez that he could transfer to any available assignment. Gonzalez selected a single-guard site in Manhattan.[2]

My colleagues concede that the Respondent had the discretion to make assignments. They simply contend that the record does not establish that the Respondent ''disregarded employee preferences.'' However, neither does the record establish that the Respondent always *honored* such preferences. Thus, the General Counsel has not established that the Respondent departed from any past practice in not assigning Gonzalez back to cash team 10.

The General Counsel argues that the Respondent sought to isolate Gonzalez by assigning him to sites where he would be alone. The contention has no merit. First, but for Gonzalez' jury duty, he would not have been reassigned from cash team 10. Second, when Gonzalez returned, he was assigned to a building where there was another employee. Third, after Gonzalez protested the assignment, he was given an assignment of his choice.[3] As noted, Gonzalez *chose* a single-guard site.

In these circumstances, I see no basis for overturning the judge's well-considered finding that the General Counsel has not established that the Respondent transferred Gonzalez in order to isolate him.

[1] The Respondent reasonably believed that Gonzalez' jury duty would be longer. Thus, the Respondent replaced him.

[2] My colleagues suggest that the single-guard sites were the only ones available. The General Counsel has not shown this to be so, and he has the burden to prove an intention to isolate Gonzalez.

[3] The Respondent departed from company policy in this respect to *benefit* Gonzalez. The policy is that an employee who does not like his assignment has only the option of resignation.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge or otherwise discriminate against any of you for joining or supporting the United Federation of Police Officers (the Union) or any other union.

WE WILL NOT transfer or reassign any of you to interfere with or discourage support for the Union.

WE WILL NOT issue disciplinary notices to employees to discourage support for the Union.

WE WILL NOT coercively question you about your union support or activities.

WE WILL NOT threaten you with discharge for supporting the Union.

WE WILL NOT engage in surveillance of your union activities or create the impression among employees that your activities on behalf of the Union were being kept under surveillance.

WE WILL NOT direct you not to discuss the Union among yourselves.

WE WILL NOT post a notice which encourages you to inform us of the identity of employees who solicit the signing of union authorization cards.

WE WILL NOT impede the distribution of union authorizations card to our employees.

WE WILL NOT attempt to dissuade a witness from testifying in this case.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Louis Bracht immediate reinstatement to a job substantially equivalent to the job of armed guard and WE WILL assist him in obtaining restoration of his license to carry a weapon and, upon the

restoration of his license to carry a weapon, WE WILL offer him back, in full, his job as an armed guard.

WE WILL make Louis Bracht whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files all references to the unlawful discharge of Louis Bracht, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

WE WILL, within 14 days from the date of the Board's Order, offer Nestor Gonzalez a reassignment to his previous job on cash team 10 or to a substantially equivalent job.

WE WILL make Nestor Gonzalez whole for any loss of earnings and other benefits, less any net interim earnings, plus interest.

WE WILL remove from our files all references to the disciplinary notice, dated February 17, 1995, that we issued to Nestor Gonzalez, and WE WILL, within 3 days thereafter, notify him in writing that this has been done.

EPIC SECURITY CORPORATION

Kevin M. Smith, Esq. and *Jessica Drangel, Esq.*, for the General Counsel.

Aaron C. Litchman, Esq. and *Brian K. Condon, Esq.*, for Epic Security Corporation.

DECISION

JAMES F. MORTON, Administrative Law Judge. These cases were consolidated for hearing. The consolidated complaint, as amended, alleges that Epic Security Corporation (the Respondent) has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act) by having coercively interrogated its employees as to their support for United Federation of Police Officers (the Union), threatened them with reprisals and took other unlawful action to discourage them from joining the Union, transferred and disciplined an employee, and discharged another because they assisted the Union. The answer filed by the Respondent places those allegations in issue. I heard this case in New York City on May 1, 2 , 21, and 22, 1996. Upon the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent provides security services for banks and other commercial customers. In its operations annually, it meets the Board's indirect outflow standard for asserting jurisdiction.

II. LABOR ORGANIZATION

The Respondent, in its answer, has denied the allegation in the complaint that the Union is a labor organization as defined in the Act. That same issue was litigated in a prior representation case involving the Respondent, Case 2–RC–21513. Relevant portions of the record in that case were received as a joint exhibit.

The Union had filed a petition in that case, seeking to represent for purposes of collective bargaining, the guards in the Respondent's employ. Based on the record made at the hearing therein, a Decision and Direction of Election issued on August 11, 1995, finding that the Union met the statutory definition of a labor organization. The joint exhibit in the record before me provides no basis to hold otherwise. I, therefore, find that the Union is a labor organization as defined in the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Organizational Effort*

The guards in the Respondent's employ have been unrepresented for purposes of collective bargaining. In late 1994, alleged discriminatee Nelson Gonzalez, a guard whom the Respondent contends in a supervisor as defined in the Act as discussed separately below, telephoned the Union after talking with several other guards. In December of that year and in January 1995 (all dates hereafter are for 1995 unless stated otherwise), he gave union authorization cards to guards in the hallways and bathroom adjacent to the Respondent's office located in a building in New York City.

B. *Gonzalez' Status as an Employee or Supervisor; Alleged Unlawful Interrogation and Threat on January 24*

1. Gonzalez' status

The complaint alleges that, on January 24, the Respondent, by its attorney, Aaron Lichtman, and its president, Selwyn Falk, unlawfully interrogated its employees about the Union's organizational effort, threatened them with discharge to discourage them from supporting the Union, and engaged in other coercive conduct specified therein. In support thereof the General Counsel offered the testimony of Nestor Gonzalez. The Respondent objected to the admission of his testimony, asserting that Gonzalez is a supervisor as defined in the Act, that thus his testimony about a meeting he had with counsel for the Respondent is barred by the attorney-client privilege and that, in any event, because Gonzalez is a supervisor and not an employee protected by the Act, the Respondent does not violate the Act by questioning him respecting his union activities.

The Decision and Direction of Election in Case 2–RC–21513, discussed above, referred to Gonzalez as a field supervisor; it did not set forth a specific finding as to his status. Individuals classified as field supervisors, however, were held therein to be supervisors as defined in the Act and thus were excluded from the unit found appropriate therein. The Respondent's brief refers to that holding in furtherance of its contention that Gonzalez is a supervisor as defined in the Act. The General Counsel however was free to develop, in the instant case, evidence as to whether an unfair labor prac-

tice has been committed via the alleged unlawful interrogation of Gonzalez or to put it directly, whether Gonzalez is a supervisor or an employee protected by Section 7 of the Act. In that regard, see *Carry Companies of Illinois, Inc*., 311 NLRB 1058 fn. 1 (1993); *Serv-U-Stores, Inc*., 234 NLRB 1134 (1978), and cases discussed therein.

There is no evidence in the record of the representation case as to the specific duties of Gonzalez. Gonzalez started working for the Respondent in 1992, assigned as a guard at various apartment buildings and to courier duties. For a period of several months in late 1993 and early 1994, he was promoted to a dispatcher's job, a supervisory position. At some point prior to 1995, he was given the rank of lieutenant. He quit the dispatcher's job in early 1994 to work again as a guard at different apartment buildings but he retained the rank of lieutenant. The Respondent placed in evidence documents it contends support its contention that Gonzalez is a supervisor. While at one of those buildings, he filled out and submitted to the Respondent's office several ''Unusual incident reports,'' e.g., in one, he wrote that he advised a child, who lived in the building, not to play under the scaffolding in the courtyard area. He noted on those reports that his title was ''Site Supervisor-armed officer.'' In the representation case decision referred to above, site supervisors were found to be employees eligible to vote in the election directed therein. On January 24, Gonzalez and another guard were assigned to a ''cash team'' which required them to pick up money from customers for delivery to banks. When they completed their run that day, Gonzalez complained to Joseph DeVittorio, the Respondent's assistant operations manager, that the vehicle to which he and his partner had been assigned was filthy. When DeVittorio determined the identity of the employee who had last used that vehicle before Gonzalez and his partner used it, he instructed Gonzalez to fill out a notice of disciplinary action against that employee. Gonzalez then wrote on the form that the vehicle was left in a deplorable condition. He testified that he did not check the boxes on the form which were marked with Xs; boxes headed warning, unsatisfactory work performance.

There is nothing upon which to find that Gonzalez was a supervisor within the meaning of Section 2(11) of the Act. That he had a supervisory title is no basis to conclude that he possessed one of the supervisory indicia set out in that Section. See *T. K. Harvin & Sons, Inc*., 316 NLRB 510, 530 (1995). Accordingly, I find that Gonzalez is an employee entitled to the protection of Section 7 of the Act.

2. Alleged unlawful interrogation and threat

Gonzalez testified credibly as to a meeting he had with Falk and the Respondent's counsel on the same day, January 24, that DeVittorio directed him to fill out the disciplinary notice discussed above. Falk, the Respondent's vice president for operations, testified for the Respondent as to the meeting. His account was not impressive. Counsel for the Respondent did not testify. Gonzalez' account disclosed that DeVittorio escorted him to the office of the Respondent's counsel; that Gonzalez viewed this as very 'unusual'; and that, there, counsel for the Respondent asked him if he had given union authorization cards to employees and, when he said he did, he was given a warning and told that it would be made part of his record. He also was told that he would be discharged if he continued to hand out union cards. Falk was present; at one point, he asked Gonzalez why the employees did not come to him instead of going to the Union.

As there is no evidence that Gonzalez was openly a supporter of the Union, or that the Respondent had any valid reason to question him respecting his union activities, and in view of the contemporaneous threat made to him, I find that the Respondent, on January 24, coercively interrogated him as to his union sympathies and threatened him with discharge if he continued to assist the Union's organizational effort. See *Medical Center of Ocean County*, 315 NLRB 1150, 1154 (1994). Further, in informing Gonzalez that it was aware that he distributed union authorization cards, it unlawfully created the impression that it kept under surveillance his activities on behalf of the Union. The Respondent's contends that testimony of the alleged unlawful interrogation is inadmissible under the doctrine of attorney-client privilege in that its counsel, in questioning Gonzalez, was acting in furtherance of the Respondent's legal interests. The attorney-client privilege does not obtain in the circumstances of this case. The Respondent's contention is without merit. See *Tamper, Inc*., 207 NLRB 907 (1973).

C. *Alleged Discriminatory Transfer of Gonzalez*

In January, Gonzalez had been working for several months as a member of a two-member cash team whose job was to collect moneys from customers for deposit in banks. On January 27, Gonzalez was called to jury duty. He returned to work on February 1 but was not reassigned to the cash team; instead, DeVittorio assigned him to work as a guard at a drug infested building in the south Bronx. Gonzalez was told in mid-February by his former cash team partner that he did not have a steady partner. Gonzalez asked DeVittorio to reassign him to the cash team job. DeVittorio told him that another employee had that job. Previous to his assignment to the cash team, Gonzalez had worked as a guard for the Respondent at other drug infested apartment buildings and also as a courier. On February 13, the Union filed the initial unfair labor practice charge in this proceeding, alleging that Gonzalez' transfer was unlawful. On March 2, the Respondent told Gonzalez to select his own jobsite. He did so and testified that he has no desire to leave it.

When working as part of a cash team, Gonzalez reported to the Respondent's office daily where he met with many of the other guards; in contrast, his assignment to the apartment building in the south Bronx kept him away from that office, except for 1 day a week when he picked up his paycheck.

The General Counsel contends that the Respondent's transfer of Gonzalez to an undesirable building shortly after the Respondent had coercively interrogated and threatened him, coupled with the fact that the transfer to that building prevented him from daily contact with coworkers and with Gonzalez' testimony that his former cash team partner told him that he was not working with a regular replacement after his transfer, established that the Respondent's decision to transfer Gonzalez on March 2 was aimed at impeding Gonzalez in his efforts to solicit his coworkers to support the Union. The timing of the transfer is suspicious but the evidence also shows that Gonzalez, prior to the Union's advent, had been assigned to other undesirable buildings where it seems his daily access to coworkers was similarly restricted. Evidence as to the timing of the transfer is not sufficient in this case to support a finding of discrimination. See *American Fur-*

niture Co., 293 NLRB 408, 415 (1989). I thus find that the General Counsel has not sustained the burden of proof respecting this allegation.

D. *Alleged Coercion on February 17*

The complaint alleges that the Respondent, by Falk, on about February 17, unlawfully directed its employees not to talk about the Union, coercively interrogated them about their union activities, threatened them with discharge in retaliation for their union activities, and created the impression among them that it was keeping their union activities under surveillance.

Gonzalez testified that, on that day, after he had picked up his paycheck at the Respondent's facility and while he was talking to several coworkers about a block distant from the Respondent's building, Falk approached them and told him that he did not want him to bother the other guards. Falk asked one of the others there, alleged discriminateee Louis Bracht, if he was on duty and when Bracht replied replied that he was, Falk ordered him to go to the Respondent's office. Falk left with Bracht but returned later to tell Gonzalez to get off the street and to stop bothering the guards.

Bracht testified as follows respecting the February 17 events. He reported for work in uniform but, as his partner had not arrived, the dispatcher told him that he could go out to eat. Outside, he met Gonzalez and several other guards. Falk came by and told him to go to the office as he was on duty. Falk followed him and, when they were in the elavator, Falk told him that he was ''out of here'' and that he was not supposed to be talking ''about that'' while on duty. When he asked Falk what he meant by ''that,'' Falk repeated the comment. Shortly afterwards, he was called to Falk's office where Falk asked him where the meeting was going to be held. (The Union held a meeting of the Respondent's employees that evening.) When Bracht professed ignorance, Falk told him not to play games as he would find out from one of his sources. When Bracht told him that he still did not know what he was talking about, Falk told him to ''get out of here and get back to work.''

In February, the Respondent posted a no solicitation rule. Until then, no such rule had been promulgated. A copy of that notice was not made part of the record in this case.

Falk testified that, on February 17, when he overheard Gonzalez talking about the Union with other guards, he told the other guards to go to the office and they left. When asked by the Respondent's counsel at the hearing if he ever asked Bracht about the Union, he responded, ''No.'' Falk further testified that, based on what he had overheard, he issued a disciplinary notice to Gonzalez. The notice is discussed separately below.

Gonzalez was issued a notice of disciplinary action by DeVittorio, dated February 17, which recited (a) that Gonzalez' ''soliciting'' an employee while employee was on duty, in effect, contravened the Respondent's ''Solicitation Policy,'' (b) that a copy of that policy was posted in the office, and (c) that a further violation of the policy may lead to termination of his employment. Gonzalez and Bracht testified that they never had seen any such Policy as of that time. The Respondent did not produce any document to corroborate the statement in the notice that a copy of the policy had been posted prior to February 17.

I credit the accounts of Gonzalez and Bracht.

The credited evidence establishes that, on February 17, the Respondent, by Falk, interrogated its employees as to their union activities when Falk asked Bracht where the Union meeting would be held. For the reasons discussed above, this interrogation was unlawful in view of the contemporaneous coercive conduct noted next. The Respondent unlawfully created the impression of surveillance of its employees' union activities when Falk told Bracht that he had sources which kept him informed about their union activities. See *T & J Trucking Co*., 316 NLRB 771, 779 (1995). Gonzalez credibly testified that he had no knowledge, as of February 17, of any rule against solicitation maintained by the Respondent. The Respondent offered no probative evidence that it then had or maintained a lawful no solicitation rule. Rather, it adopted and implemented a no solictation policy directed against the exercise by its employees of their right to discuss the Union. Thus, when Falk told both Gonzales and Bracht that they could not talk about the Union, the Respondent impliedly warned them that they faced disciplinary action if they continued to discuss the Union and thus, it unlawfully restricted employees as to their rights under Section 7 of the Act to discuss the Union. It further violated the law when DeVittorio issued a notice of disciplinary action to Gonzalez because he discussed the Union with his coworkers and by warning him in that notice that he could be discharged for doing so. *T & J Container Systems*, supra. The General Counsel construes Falk's statement to Bracht that he ''was out of here'' as a direct threat of discharge. Falk's use of virtually that same phrase later in the conversation when he told Bracht to get to work, however, militates against such a finding. In any event, the totality of Falk's remarks to Bracht constituted, as found above, an unlawful implied threat of disciplinary action.

E. *The Respondent's March 24 Bulletin to Employees*

On March 24, the Respondent posted on its bulletin board a document signed by Falk and addressed to its employees which called the Union's president a ''con man'' and which contained the following paragraph:

> If (the Union's president) or his stooges show up at your worksite, you don't have to talk to them. You can immediately call the (Respondent's dispatcher) or any . . . supervisor for help.''

A former supervisor, called as a witness by the General Counsel respecting other aspects of this case, stated during his examination by the Respondent that one of his duties was to ensure that guards had no visitors when on duty. The Respondent relies on this testimony respecting its position that the quoted excerpt from the March 24 bulletin was a lawful statement.

The bulletin, however, did not purport to state or restate any nondiscriminatory work rule but, rather, made it clear to employees that that should notify the Respondent if they were solicited to support the Union. In that context, the Respondent impeded its employees respecting the exercise by them of their rights under Section 7 of the Act. See *Arcata Graphics/Fairfield, Inc*., 304 NLRB 541 (1991), and cases discussed therein.

F. *Bracht's Discharge*

The complaint alleges that Louis Bracht, a guard, was discharged by the Respondent because of his activities on behalf of the Union; the Respondent contends that he was discharged for other reasons discussed below.

Bracht worked for the Respondent as a guard from July 1990 until his discharge on April 6. He signed an authorization card for the Union in December 1994 and distributed authorization cards among other guards. As discussed above, he was unlawfully questioned by Falk on February 17 about a Union meeting scheduled for that night, a meeting he attended. The clear inference drawn from the nature of his interrogation by Falk on February 17 is that Falk was aware of Bracht's support for the Union. The Union filed the petition in the representation case discussed above on February 21; it was during the course of the investigation of that petition by the Board's regional office that Bracht was discharged.

Bracht testified as follows. He was discharged on April 6. He was told by Falk on that day that he, Falk, had just been informed by a security officer that Bracht and his partner, Nelson Torres, had molested him. Bracht said he knew the officer that Falk referred to and that he, Bracht, was just playing with him. Falk said the officer did not think that Bracht was playing with him, that Bracht had thrown the officer against the truck to pat him down and asked that officer if he was wired. Bracht denied having done so and told Falk that he had never touched his gun. Falk, referring to another incident, said that one of the Respondent's officers had been shot because somebody was horsing around. Falk then told Bracht that he was fired for menacing and for violation of New York City's pistol rules and regulations.

Falk's account follows. On April 6, he received a report that Bracht had been involved in an incident which involved his having publicly embarrassed another employee and which also involved a firearms violation. He told Bracht that he had better have a good reason for his actions. Bracht admitted that he threw the other employee up against the vehicle, had put his hand on his revolver, patted the other employee down to determine if he carried a gun, and that all this was done on a public street. Falk then decided to discharge Bracht as Bracht's statement to him in this meeting ''was the one step that made him fall into the water'' in view of his past record of a prior unauthorized use of a firearm, unauthorized use of a company vehicle and his continued latenesses. Falk answered in the affirmative when asked by the Respondent's counsel if he then discharged Bracht. He did not testify as to what he said, if anything, to Bracht in discharging him.

The reference to the unauthorized use of a vehicle referred to a warning given Bracht on February 17; the reference to latenesses appears to pertain to warnings issued Bracht for having been late on February 21 and 22. Those warnings were the only ones issued to Bracht in the prior 2 years. Falk also testified that, as of the date of Bracht's discharge, he had no knowledge that Bracht supported the Union.

Bracht had taperecorded his meeting with Falk on April 6. In accordance with the procedure outlined just before the close of the hearing, the General Counsel and the Respondent afterwards submitted their respective transcripts of the tape. The transcript submitted by the General Counsel, premarked as General Counsel's Exhibit 17 and received in evidence, is renumbered as General Counsel's Exhibit 17(a). The Respondent's first transcript is marked and received as General Counsel's Exhibit 17(b). The Respondent's second transcript, accepted in substance by the General Counsel as noted in the next sentence, is marked and received as General Counsel's Exhibit 17(c). The General Counsel has accepted as accurate this transcript submitted by the Respondent, noting two differences, both minor and inconsequential. Nontheless, the Respondent has moved to reopen the hearing as the copy of the tape it received produced a click during the playing of the early part of the meeting. It contends that it should be allowed to call an expert witness to determine whether the tape has been tampered with. The motion is denied as the Respondent's transcript of the tape and the General Counsel's are in substantial accord.[1] Moreover, the Respondent has not asserted what specifically it contends may have been changed and it is not appropriate to expend the Board's resources based on a speculation that the click heard on the Respondent's copy of the tape may be meaningful. Further, and as noted by the General Counsel, there appears to be continuity between the portion of the Respondent's transcript just before the click and the portion immmediately following. The Respondent, in its posthearing correspondence, also sought to reopen the hearing, stating that it wished to complete its redirect examination of Falk and to conduct a voir dire examination of Bracht respecting the tape. That request is denied. The record is clear that Falk's redirect examination had been completed; the reason for my ruling, denying the motion to reopen the hearing for an inquiry as to the tape, effectively disposes of the request to reopen the hearing for a voir dire of Bracht thereon.

The transcript of the tape discloses the following. Falk asked Bracht about a complaint he just received from a security officer that Bracht and his partner, Nelson Torres, had menaced that officer. Falk told Bracht that he was concerned because he ''had one guy shot in the last few weeks.'' He told Bracht that he did not like guys fooling around with guns. Bracht said that all he did was touch it and was just fooling around. Falk said that the officer had reported that Bracht asked him if he was wired, that Bracht made him take out his walkman, that Bracht put him in a ''V'' position (to search him) while holding a gun. Bracht said that that was ''not true.'' Falk then said that he had met with other people in the Company and the decision was to terminate Bracht. He also said to Bracht then that he is terminating him based on the report he received, ''violations of firearms rules and regulations and the fact that (Bracht) menaced one of (the Respondent's) employees in public.'' Bracht asked to be given a copy of the report; Falk said he would get a copy for him.

The incident referred to in the discussion between Bracht and Falk took place in the Borough of the Bronx in New York City on January 11. Torres and Bracht had stopped their armored truck to deliver money to a bank when Angel Lopez, an off-duty security officer, approached them. Lopez did not testify.

[1] The Respondent's motion to reopen dated July 11, 1996; its letter thereon dated July 17, 1996; the General Counsel's July 17 letter in opposition; the Respondent's July 18 letter; the General Counsel's July 19 letter; and my letter of July 19 advising that I would defer ruling on the motion to consider its merits in context with the whole record, are all received in evidence as ALJ Exhs. 1(a), (b), (c), (d), (e), and (f), respectively.

Nelson Torres testified that, a few days after the January 11 incident, one of the Respondent's dispatchers, surnamed Beck incident and he then told Beck what had happened. Torres told Bracht of his discussion with Beck. Bracht testified that, on January 16, he filled out a document entitled ''Unusual Incident Report'' which set forth the circumstances of the meeting with Lopez five days earlier and that, on the evening of January 16, he left it on the desk of the Respondent's assistant operations manager, Joseph DeVittorio. The Respondent argues that Bracht fabricated this report for purposes of the hearing before me, noting that Bracht did not bring such a report to a hearing which had been held before the New York State Unemployment Board. In its brief, the Respondent contends that Bracht acknowleged, in his testimony in the instant case, that he had not prepared such a report as of the date of the Unemployment Board hearing. The transcript does not support that contention.

DeVittorio testified that, prior to the hearing in this case, he had never seen Bracht's January 16 Unusual Incident Report. He related also, however, that it was in early March that Angel Lopez told him about the January 11 incident and that he told Lopez then that he should not have walked up to the vehicle guarded by Bracht and Torres as it was possible that that they felt threatened by his approach. That concern would appear to be warranted for, in November 1994, an off-duty guard walked up to a guard on duty and shot him. In any event, DeVittorio's account did not suggest that he considered Bracht at fault for having accosted Lopez on January 11.

The Respondent placed in evidence a ruling by the New York State Unemployment Insurance Appeal Board that denied Bracht benefits based on his conduct on January 11. That ruling is not dispositive of the issue before me but may be considered with the record as a whole. I find that it has no material impact respecting the issue of discrimination before me.

I do not credit Falk's testimony that he had not known of Bracht's support of the Union when he discharged him on April 6. As found above, he had interrogated and threatened Bracht on Feburary 17 about the Union. It is apparent, from the nature of Falk's remarks then that he was aware that Bracht supported the Union. I also do not credit Falk's account that he learned on April 6 of the January 11 incident. I credit Bracht's account that he left a report of that incident with DeVittorio, Falk's assistant, on January 16. I credit Torres' testimony that, in January, a dispatcher and thus a supervisor as determined in the representation case referred to above, had asked him about that incident. Certainly, the Respondent is chargeable with knowledge then of the January 11 incident. In any event, DeVittorio's own account discloses that he was aware of that incident a month before Bracht's discharge. The reason Falk gave for terminating Bracht's employment was convoluted and confused. At one point, his account indicated that he and others had earlier discussed and decided to discharge Bracht. At another point in his account, he testified that he decided to terminate Bracht's employment when Bracht told him that he had put his hand on his gun. The reasons he proffered also appears to be at variance with the substance of DeVittorio's testimony who viewed Lopez at the one who was at fault on January 11 for having approached the armored vehicle.

The credited evidence discloses that Bracht actively supported the Union and that the Respondent knew this. It had unlawfully interrogated and threatened him to discourage him from supporting the Union. Falk's testimony as to his reasons for discharging Bracht was confused and appeared to grope for a basis, any basis other than a discriminatory one, for support. He indicated that the principal basis was Bracht's involvement in the January 11 incident. Yet, he knew of that incident long before April 6 but attempted to conceal that fact by telling Bracht on April 6 that he had learned of it just that day. He referred to Bracht's having been late but, for 2 years prior to the February 17 coercive interview Bracht had with Falk, Bracht's record was clear. Falk testified that Bracht was on very thin ice; the evidence thereon, however, is that the only warning Falk gave to him that his job was in jeopardy was the implied threat made on February to discourage him from continuing to support the Union. The credited evidence discloses that Bracht was discharged for having supported the Union and there is no probative evidence that he would have, in any event, been discharged for a nondiscriminatory reason. Under the guidelines set out in *Wright Line*, 251 NLRB 1083 (1980), I find that the Respondent discharged Bracht from its employ on April 6 in order to discourage its employees from supporting the Union. See *T & J Trucking*, supra.

G. *Alleged Interference with Distribution of Union Authorization Cards in 1996*

An amendment to the complaint alleges that, in February 1996, the Respondent by various named supervisors confiscated authorization cards being distributed by the Union to the Respondent's guards that it engaged in surveillance of their union activities. In support thereof the General Counsel offered the testimony of Gonzalez and of William Cordero, a former supervisor. Gonzalez impressed me as a credible witness; Cordero's account, however, gave me pause. He had been discharged for cause; more significantly, more than once he testified forcefully to certain matters, thus indicating that he had first hand knowledge of those matters, only to admit later than he based his accounts in those areas on surmise.

Gonzalez testified credibly that, on a Friday early in 1996, he, Bracht and the Union's president stationed themselves outside the building in which the Respondent has its offices and that they sought to hand out union authorization cards to guards as they arrived en masse to collect their paychecks. He observed that, when the Union's president gave a guard a card and a flyer, several supervisors surrounded that guard and led him into the building. He, himself, was followed by two supervisors. Hand and eye gestures made to him by some of the guards indicated that they were then being watched by the Respondent's supervisors.

The Respondent contends, and offerred testimony to the effect, that safety and other concerns motivated it to assign supervisors to monitor guard movements about its building. The credited evidence noted above points instead to a different concern.

I find, based on Gonzalez' account, that the Respondent unlawfully impeded the Union in its attempt to distribute its literature. Cf. *Farm Fresh, Inc*., 305 NLRB 887, 888 (1991).

H. *Alleged Effort to Dissuade a Witness from Testifying*

The complaint, as amended, alleges that the Respondent interfered with Board processes by attempting to dissuade one of the General Counsel's witnesses from testifying in this proceeding. The witness was William Cordero.

Cordero had been a supervisor employed by the Respondent until he resigned on March 26, 1996, upon the Respondent's learning that he had been responsible for a defalcation. Cordero testified that, on April 19, 1996, Falk called him, asked him if the ''Labor Board'' had subpoened him to testify in this case, told him that he did not have to testify and that he could tell the Labor Board to stop bothering him.

Falk denied having called Cordero. He testified that one of the Respondent's supervisors, Mike Jimenez, told him that Cordero had called him and said he had been subpoened to testify and wanted to know what to do. Falk testified that he told Jiminez to tell Cordero that, as he was no longer in the Respondent's employ, he can do as he wishes. Jiminez testifed for the Respondent but did not refer to any such conversation with Cordero, or with Falk.

While I had reservations as to Cordero's credibility in another area, discussed above, his account of his discussion with Falk is more persuasive than Falk's.

Falk's unsolicited ''advice'' to Cordero that he need not testify in the hearing before me contained no overt threat of reprisal. His letting Cordero speculate, however, as to what may happen if he refused the advice, i.e., whether the Respondent would prosecute him for the defalcation, whether it would blackball him with companies interested in hiring him, or otherwise, could well have been more effective than any express warning.

The Board has observed that ''clearly inherent in the employees' statutory rights is the right to seek their vindication in Board proceedings . . . (and that) rank-and-file employees are entitled to vindicate these rights through the testimony of supervisors who have knowledge of the facts, without the supervisors risking discharge or other penalty for giving testimony under the Act adverse to their employer.'' *Better Monkey Grip Co*., 115 NLRB 1170 (1956). See also *Parker-Robb Chevrolet*, 262 NLRB 402 (1982). I find that the Respondent, by Falk, interfered with employee rights under Section 7 of the Act by having impliedly warned Cordero that he may well face unspecified reprisals if he gave testimony against it in this case as to matters learned while having served as a supervisor for the Respondent.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization as defined in Section 2 (5) of the Act.

3. The Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act in interfering with, restraining and coercing its employees in the exercise of their rights under Section 7 of the Act by having:

(a) Coercively interrogated them as to their support for the Union.

(b) Threatened them with discharge if they continued to support the Union.

(c) Created the impression among them that their activities on behalf of the Union were being kept under surveillance.

(d) Directed them not to discuss the Union among themselves.

(e) Posted a notice which encouraged its employees to inform it of the identity of employees who solicit the signing of union authorization cards.

(f) Impeded the distribution of union authorization cards to its employees.

(g) Attempted to dissuade a witness from testifying in this case.

(h) Engaged in the conduct set forth in paragraph below.

4. The Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(3) of the Act in discriminating against its employees with respect to their terms and conditions of employment in order to discourage them from joining or supporting the Union by having:

(a) Issued a warning, dated February 17, 1995, to Nestor Gonzalez.

(b) Discharged Louis Bracht on April 6, 1995.

5. The unfair labor practices described above in paragraphs 3 and 4 affect commerce within the meaning of Section 2 (6) and (7) of the Act.

6. The Respondent has not engaged in any of the other unfair labor practices alleged in the consolidate complaint, as amended, in this case.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged Louis Bracht, it must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). In reinstating him the Respondent must assist him in obtaining restoration of his license to carry a weapon as a requirement for employing him as a cash team security officer.

[Recommended Order omitted from publication.]